

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )

BEFORE THE CHIEF PROCUREMENT OFFICER

DECISION

In the Matter of Protest of: )

CASE NO. 2007-133

Trane Comfort Solutions, Inc. )

Materials Management Office )

POSTING DATE:

RFP No. 07-S7471 )

NOVEMBER 26, 2007

Chiller Maintenance and Repair for the )

Medical University of South Carolina )

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from Trane Comfort Solutions, Inc. (Trane). With this request for proposals (RFP), the Materials Management Office (MMO) attempts to procure chiller maintenance and repair service for the Medical University of South Carolina (MUSC). MMO refused receipt of Trane's proposal as late. In the letter, Trane protested MMO's rejection of its bid alleging that it delivered the bid to MMO on time for the opening. Trane asserts that MMO closed the bidding early, before the announced opening time. They assert further:

- 1) A box containing the proposal was placed on the desk in the appropriate procurement office when, according to the cell phone clock of Trane's representative, the time display was showing 11:00 am. The cell phone time is supposed to be linked to the "world clock" system.
- 2) The procurement officer had made no official declaration that bidding was closed.
- 3) There was no requirement, either in the RFP or in a procurement regulation that the MMO wall clock would be deemed official.
- 4) In a previous protest<sup>1</sup>, incorporated into this letter, Trane argued that "if found that the bid was submitted two minutes late, Trane urges that its bid be permitted to be filed, in the exercise of discretion held by the purchasing officer. That is fair and proper here, because the "special instructions" found in the solicitation materials provide that: 'In competitive sealed proposals, prices will not be divulged at opening.' "

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<sup>1</sup> Trane protested MMO's refusal to accept its bid previously. In decision No. 2007-119, the CPO denied the protest, ruling it not yet ripe, as no award had been posted by MMO. Trane appealed that decision to the Procurement Review Panel, but later withdrew its appeal.

Trane asked that the CPO determine Trane in compliance with the submittal deadline, or, in the alternative, order a resolicitation.

In order to resolve the matter, the CPO conducted a hearing November 16, 2007. Appearing before the CPO were Trane, represented by Daniel T. Brailsford, Esq.; MUSC, represented by Rosalind Giddens, Associate Director of Purchasing; and MMO, represented by John Stevens, State Procurement Officer.

### **NATURE OF PROTEST**

The letter of protest is attached and incorporated herein by reference.

### **FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On April 24, 2007, MMO issued the RFP. [Ex. 2]
2. On May 8, 2007, MMO conducted a pre-proposal conference.<sup>2</sup>
3. On May 16, 2007, MMO issued Amendment No. 1. [Ex. 3]
4. On May 23, 2007, MMO issued Amendment No. 2. [Ex. 4]
5. On June 6, 2007, MMO issued Amendment No. 3. [Ex. 5]
6. On June 22, 2007, MMO opened the proposals.

### **CONCLUSIONS OF LAW**

The lone issue to be decided here is whether Trane delivered its bid to MMO before the bidding deadline or not. According to Heather Sewell, Trane's Marketing Leader, she left Trane's office at 111 Lott Court, which is off of Highway 378 past Lexington Medical Center in West Columbia, at 10:41 a.m., 19 minutes before the 11:00 a.m. bid deadline. Ms. Sewell testified that she sat the first of two boxes of proposals on the desk (actually, the Dutch door) in the MMO bid room when the time on her cell phone showed 11:00 am. She planned to return downstairs to gather the second box of proposals and return with them. However, Edna Sims,

MMO Bid Room Supervisor, advised Ms. Sewell that the bidding deadline had passed and refused receipt of Trane's proposal. According to Ms. Sims, Ms. Sewell arrived at MMO with Trane's proposal at 11:02.

In the protest letter, Trane alleged that there had been no official declaration that bidding was closed. According to Ms. Sims, she made a closing statement at 11:00 am and declared that no further bids would be accepted. Ms Sewell was not in the bid room.

Ms. Sewell alleged that, according to her cell phone, it was actually 11:00 when she delivered Trane's bid. Her position relies entirely upon the accuracy of the time of her phone. Cell phones display time digitally. A digital clock holds the digits, i.e., 11:00, for a full 60 seconds before changing to 11:01. One second after a digital clock displays a time of 11:00, it is actually after 11:00. Courts have recognized this reality with digital clocks. The United States District Court wrote, "The clock has no second hand, and only stamps the time to the last full minute. Thus, a stamp of "2:30" could be either 2:30:01 or 2:30:59." Washington Mechanical Contractors, Inc. v. U.S. Dept. of Navy, 612 F. Supp. 1243, 1245 (D.C. Cal. 1984).

Regarding the acceptance or rejection of late bids, the Procurement regulations state as follows:

19-445.2070. Rejection of Individual Bids.

H. Exceptions to Rejection Procedures. Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the designated purchasing office or the governmental bodies' mail room which services that purchasing office prior to the bid opening.

Regulation 19-445.2095(G)(3) makes Regulation 19-445.2070 applicable to RFPs.

The procuring agency, not the bidders, decides when the bidding deadline has arrived. The United States Comptroller General has ruled, "When the bid opening officer receives a hand-carried bid after declaring the arrival of the 10:30 a.m. bid opening time as shown on the bid opening room clock, but at 10:29 a.m. according to a recorded telephonic time report, the agency properly rejected the bid as late." K.L. Conwell Corporation, 1986 WL 63047, B- 220561, 86-1 CPD P 79 (Comp .Gen. Jan 23, 1986). Similarly, the Comptroller General

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<sup>2</sup> Because this solicitation was issued before September 2007, the amendments made to the regulations in May 2007 are inapplicable to this procurement. R. 19-445.2000(E).

has ruled, "When the bid opening officer receives a bid hand-carried by a Federal Express courier after declaring the arrival of the 10:30 a.m. bid opening time as shown on the bid opening room clock, the agency properly rejected the bid as late, even though the courier claims that the bid actually was delivered at 10:29 a.m., based upon the time displayed electronically on the courier's hand-held computer after scanning the bid package." W.W. Asphalt, 1989 WL 240990, B- 235560, 89-2 CPD P 106 (Comp. Gen. Aug 03, 1989).

Trane asks:

"if found that the bid was submitted two minutes late, Trane urges that its bid be permitted to be filed, in the exercise of discretion held by the purchasing officer. That is fair and proper here because the "special instructions" found in the solicitation materials provide that: 'In competitive sealed proposals, prices will not be divulged at opening.'

Trane argues, in effect, that time of opening is irrelevant because procurement officers are not required to publish bid amounts when they open proposals. The premise is that the potential for bidder mischief, which requires strict closure of bidding periods, is not a concern at proposal openings. Trane requests that the CPO waive the RFP's requirement that proposals be delivered timely.

However, regarding timely delivery of bids, the regulations expressly provide for rejection of late proposals. [19-445.2070(H)]

### **DETERMINATION**

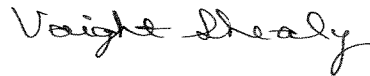
The testimony of the actual time Ms. Sewell delivered Trane's proposal is conflicting. According to Ms. Sims, Ms. Sewell arrived at MMO with Trane's proposal at 11:02. According to Ms. Sewell, her cell phone showed that it was actually 11:00 when she delivered Trane's bid. As a matter of fact, I find that Sewell's proposal was delivered after the clock struck 11:00am, and thus, after the time for submitting proposals had passed. In addition, I find that Trane's proposal was submitted after the procurement officer's designee, Ms. Sims, had declared that the time set for bid opening has arrived.

Regardless, the Consolidated Procurement Code (Code) gives deference to the procuring agency. Other jurisdictions have recognized similar deference for the procuring agency in determining the time of the bidding deadline.

The United States Comptroller General wrote, "It is an offeror's prime responsibility to submit its bid prior to the time specified in the invitation, regardless of the time of actual opening or the alleged inconsistency of the agency's clocks. The protest must be denied since any relaxation of this rule would only increase disagreement and the opportunity for frauds." Johnston & Zuccotti, 1972 WL 6796, B- 174401 (Comp.Gen. May 10, 1972). The United States District Court wrote, "The Comptroller General opinions consistently reflect the presumption that the bid officer's declaration of bid opening time is correct." 612 F. Supp. 1247.

On a multi-million dollar solicitation, Trane allowed itself a scant nineteen minutes to travel through West Columbia, into downtown Columbia, and then deliver two boxes of proposals to MMO's office on the sixth floor. Not surprisingly, Trane's bid arrived after the bidding deadline had passed.

The protest is denied.



R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services

November 26, 2007

Date

Columbia, S.C.

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of posting of the decision in accordance with Section 11-35-4210(5). The request for review shall be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel and shall be in writing, setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

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Additional information regarding the protest process is available on the internet at the following web site:  
[www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 66.1 of the 2005 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2005 S.C. Act No. 115, Part IB, § 66.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003). Copies of the Panel's decisions are available at <http://www.procurementlaw.sc.gov>